U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 12Jul2002

CASE NUMBER: 2002-LHC-63

OWCP NO.: 06-131558

IN THE MATTER OF

CEDRICK C. JOHNSON,
Claimant

v.

INGALLS SHIPBUILDING, INC.,
Employer

APPEARANCES:

Robert E. O'Dell, Esq.,
On behalf of Claimant

Paul M. Franke, Esq.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Cedrick Johnson (Claimant) against Ingalls Shipbuilding, Inc. (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on May 15, 2002, Gulfport, Mississippi.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced fifteen exhibits which were admitted, including: medical reports from Drs. Daniel

Enger, William D. Bridges, Joe E. Jackson, Terry J. Millette, M. F. Longnecker, and from Springhill Memorial Hospital; Claimant's wage statement; Claimant's deposition; various Department of Labor forms; Claimant's application to Ingalls Shipbuilding; Claimant's earnings reports; the National Average Weekly Wage Minimum and Maximum Data Chart; and various correspondence with Claimant's claims adjuster.[1] Subsequent to the hearing Claimant introduced two additional exhibits: discovery responses from Employer, and the deposition of Dr. Longnecker. Employer introduced sixteen exhibits, which were admitted, including: various Department of Labor forms; a choice of physician form; medical records from Drs. Enger, Longnecker, Jackson, and Ingalls Infirmary; a LS-200 report of earnings; Claimant's discovery responses; the vocation reports of Walker & Associates; the deposition of Claimant; and an annual earnings report of Claimant.

I. POST HEARING EVIDENTIARY RULINGS

Claimant objected to the admission of Employer's Exhibit Nine, page seventeen , a "To Whom It May Concern" letter from Dr. Longnecker referencing Claimant. The basis for Claimant's objection was that it was procured ex-parte as there was no authorization for Employer or its agents to communicate with Dr. Longnecker. Claimant had obtained the letter, dated May 27, 1999, through discovery, but had not actually become aware of the letter until the morning of the hearing. (Tr. 12). In addition to the ex-parte objection to the exhibit, Claimant contended that it should be excluded pursuant to Fed. R. Evid 403, on grounds of relevance. (Tr. 12-13). *See* 29 C.F.R. § 18.403 (2001). Claimant further contended that he signed a release that allowed ex-parte communications on October 11, 1999, and unilaterally withdrew his permission to have ex-parte communications with Dr. Longnecker on February 25, 2000. (CX 13, p. 2; CX 14, p. 1). Claimant also asserted that the authorization in place prior to October 11, 1999, did not allow Employer to discuss or confer about Claimant's case with medical care providers. (Tr. 13).

Employer responded that it was unaware of how the document was procured, but did not think that it was important because there was no prohibition against ex-parte communication under the Longshore Act. (Tr. 15-16). Claimant retorted that a patient's medical privilege was protected under Mississippi state law in this case.

The administrative law judge has great discretion in admitting evidence ands he is not bound by any formal evidentiary rules. 33 U.S.C. § 923(a) (2001). "The consideration of ex parte reports is generally permitted where the reports' authors are not biased and have no interest in the case, the opposing party has the opportunity to cross-examine or subpoena witnesses, and the reports are not inconsistent on their face." *A.M. Vonthronsohnhous v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154, 157

[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

(1990). The Fifth Circuit has also required that an opportunity be afforded to a party to cross examine the author of an ex parte medical reports before admitting the report into evidence. *Huges v. Bethlehem Steel Corp.*, 17 BRBS 153, 156 (1985) (citing *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117 (5th Cir. 1980); *Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951)).

At the hearing, I admitted the letter and allowed Claimant the opportunity to depose Dr. Longnecker, thus preserving Claimant's right to cross-examine the physician regarding his statements.[2] (Tr. 19-20, 22-24). Subsequently, on May 20, 2002, Claimant filed a Motion to re-open the record to admit an extra exhibit (Claimant's Exhibit 16), detailing discovery responses from Employer, wherein Dr. Longnecker admitted to a two percent disability rating to Claimant. Additionally, Claimant contends that in light of this exhibit, the court should reconsider its ruling on the admissibility of Employer's Exhibit Nine, page sixteen. In support of his Motion, Claimant asserts that Employer had admitted by stipulation that Dr. Longnecker had assigned Claimant a two percent permanent partial disability rating only to withdraw that stipulation at the time of the hearing. In its answer to Claimant's request for admission, Employer stated: "It is admitted that although Dr. Enger released claimant without a permanent partial disability, Dr. Longnecker assigned a 2% permanent partial disability."

On May 23, 2002, Employer filed an Opposition to Claimant' s Motion to Re-Open the Record arguing that Claimant had Employer's discovery responses nearly four months prior to hearing, and Claimant failed to exchange what is now being offered as Claimant's exhibit sixteen twenty days before the hearing as required by the pre-hearing order. Furthermore, Employer asserts that it never agreed to the two percent disability rating citing the fact that such a stipulation was not part of Employer's proposed stipulations, dated April 25, 2002, and the fact that Employer clearly listed the extent of Claimant's disability as a matter for trial.

An admission is "generally binding on the party who makes it, and supercedes the pleadings *pro tanto*." Mary K. Kane & Author R. Miller, CIVIL PROCEDURE, 418, n.15 (3rd Ed. 1999). Under 29 C.F.R. § 18.20(e) (2001), any matter admitted "is conclusively established" unless the judge permits withdraw or amendment of the admission. To withdraw an admission, the judge must determine whether the withdrawal: 1) would serve the presentation of the case on its merits, but 2) would not prejudice the party that obtained the admissions in its presentation of the case. Fed. R. Civ. P. 36(b) (2001); *In re Carney*, 258 F.3d 415, 419 (5th Cir. 2001).

> In considering whether the presentation of the merits will be facilitated by permitting an admission to be withdrawn, the court may look at whether the admission is contrary to the record of the case. The court may allow amendment or withdrawal of an admission when an admission is no longer true because of changed circumstances or when through an honest error a party has made an improvident admission. The court must also look at whether the effect of upholding the

[2] Claimant noticed the deposition of Dr. Longnecker for June 4, 2002 and I designate that report as Claimant's Exhibit 17.

admissions would be practically to eliminate any presentation of the merits.

North Louisiana Rehabilitation Center, Inc. v. United States, 179 F. Supp. 2d 658, 663 (W.D. La. 2001)(quoting *Ropfogel v. United States*, 138 F.R.D. 579, 583 (D. Kan 1991).

Prejudice of a withdrawal is established when the opposing party is left with the need to develop new evidence. *American Automobile Association v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1120 (5th Cir. 1991). "The necessity of having to convince the trier of fact of the truth of a matter erroneously admitted is not sufficient. Likewise, preparing a summary judgment motion in reliance upon an erroneous admission does not constitute prejudice." *North Louisiana Rehabilitation Center, Inc.*, 179 F. Supp. 2d at 663 (quoting *F.D.I.C. v. Prussia*, 18 F.3d 637, 640 (8th Cir. 1994).

Here, I find that Employer's admission was truthful in that Dr. Longnecker did assign a two percent permanent partial disability. I do not read Employer's response to state definitively that Claimant has a two percent disability, or to state that it was Dr. Longnecker's final position that Claimant had such a disability. Rather, Employer only admits what was in an early report by Dr. Longnecker. Regardless of the interpretation of Employer's response, I find that Employer's Response to Claimant's Motion is properly construed as a Motion to Withdraw. As such, I note that withdraw of the admission facilitates the presentation of the case on the merits - which involves the extent of Claimant's disability - and aids the fact finder by enlarging the body of evidence upon which to make a considered determination of that issue. Claimant is not prejudiced by the withdraw because the extent of Claimant's disability was an issue developed in the record beginning in 1990, Claimant had plenty of opportunity to conduct discovery on that issue, and Claimant had the opportunity to depose Dr. Longnecker, post-hearing, to cross-examine him on any ex parte communication or prejudice and I granted Claimant the authority to develop the underlying rationale of Dr. Longnecker's medical assessment. Therefore, I DENY Claimant's Motion to Reconsider the ruling on the admissibility of Employer's Exhibit nine, page seventeen.

In my Pre Hearing Order, I instructed the parties to pre-mark and exchange all exhibits twenty days prior to trial. Claimant did not submit Exhibit Sixteen prior to that deadline. Nevertheless, the exhibit is nothing more than Employer/Carrier's discovery responses, and as such, Employer/Carrier cannot be prejudiced by their admission into evidence. Accordingly, I GRANT Claimant's Motion to Re-Open the Record and allow the admission of Claimant's Exhibit Sixteen.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

II. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The date of injury was June 26, 1990;

2. The injury occurred in the course and scope of employment, and an employer-employee relationship existed at the time of the accident;

3. Employer was timely advised of the injury;

4. Notice of controversion was filed timely;

5. An informal conference was held on April 15, 1999, and February 23, 2000, and Claimant requested a third conference, but the claims examiner Herman advised that there would be little purpose in a third conference;

6. Claimant was paid compensation at a minimum rate of $165.16;

7. Employer paid to Claimant $755.00 in temporary total disability from:
June 25, 1990 - August 12, 1990,
September 5, 1990 - September 21, 1990, and on
November 19, 1990;

8. Employer claims an overpayment of $117.95 , which was reimbursed to Employer through payroll deductions; and

9. Total medical paid to date is $11,726.12.

III. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of disability and date of maximum medical improvement;

2. Intervening causation;

3. Average weekly wage;

4. Employer's entitlement to credit; and

5. Interest and attorney's fees.

IV. STATEMENT OF THE CASE

A. Chronology

On May 24, 1990, Claimant began work for Employer as a chipper, a job that entailed grinding weld seams with surface grinders, bulkeye, burr motors, offsets, and needle guns. (Tr. 43; CX 11, p. 2)

Prior to working for Employer, Claimant described himself as a "strong young man" with no physical problems. (Tr. 49). On June 26, 1990, Claimant felt a "pop" in his back while lifting a heavy steel bar, and subsequently went to Employer's infirmary where he was referred Dr. Enger, an orthopaedist, for treatment. (Tr. 44; CX 1, p. 39).

Dr. Enger, first treated Claimant on June 29, 1990, opining that Claimant was suffering from back strain and functional overlay. (CX 1, p. 34-35). Routine x-rays did not demonstrate any abnormalities. *Id*. at 34. Dr. Enger opined that Claimant was fit for light work at the time of his visit and if Claimant was fitted with a back corset Claimant could "remain on the job." *Id*. at 35. After several more visits, Dr. Enger stated on July 27, 1990, that he found little in the way of objective evidence to substantiate Claimant's continued reports of back pain. (CX 1, p. 24). Because Claimant stated that he could not return to work, Dr. Enger ordered an MRI to ascertain whether there was some degeneration of the disc material. *Id*. Based on Claimant's history, which included a voluntary withdraw from strenuous physical activities in high school sports, Dr. Enger predicted that diagnostic testing would not pick up anything objective and that Claimant was merely using the injury to be transferred to a more desirable job as a forklift operator. *Id*. at 25.

In a report dated August 14, 1990, Dr. Enger told Claimant that he did not know the origin of his problem. (CX 1, p. 22). Additionally, finding no contraindication based on Claimant's physiotherapy, Dr. Enger found no reason why Claimant could not return to work as a chipper, limited to working "downhand" for four to six weeks with no overhead grinding. *Id*. On September 13, 1990, Dr. Enger remarked that x-rays, a bone scan, a myelogram of the entire cervical, thoracic and lumbar spine with CAT scanning were all normal. *Id*. at 20. A MRI of the lumbar spine showed only degeneration at L4-5 with loss of water content but had no evidence of disc herniation. *Id*. Likewise an arthritic work-up was normal. *Id*. Nevertheless, Dr. Enger continued Claimant's work restrictions. *Id*. at 18. On September 26, 1990, Dr. Enger noted that Claimant continued to complain of pain, but because Claimant's work up was negative, Dr. Enger stated that Claimant could remain on the job. (EX 8, p. 12). Based on a pain pattern created by Claimant on October 24, 1990, Dr. Enger could not think of any medical syndrome to fit the pattern other than the fact that there was a strong possibility that Claimant was a symptom magnifier. *Id*. at 15. Nevertheless, Dr. Enger opined that Claimant likely experienced pain due to a minimal loss of water content at the L4-5 disc. *Id*. at 14.

On March 15, 1991, Dr. Wiggins referred Claimant to Dr. Enger for a second opinion regarding Claimant's knee complaints. (CX 1, p. 10). Claimant had underwent surgery for his ankle on December 11, 1990, and also had an arthroscopy of his left knee. *Id*. When Dr. Wiggins released Claimant to return to work on March 4, 1991, and Employer refused to take Claimant back as a chipper because that work entails a lot of squatting, kneeling and climbing. *Id*. Dr. Wiggins opined that Claimant had reached the end of medical treatment for his knee in light of the normal results from the arthroscopy and stated that unless Dr. Enger could think of another treatment Claimant would have to live with the problem and search for a new job. *Id*.

Claimant returned to work for Employer in November 1991, and worked until mid March 1992. (EX 16, p. 1-2). Claimant was officially terminated on June 25, 1992, for failure to return from a leave of absence. (Tr. 122) Subsequent to his termination, Claimant's mental condition deteriorated, a problem that Claimant blamed, in part, on harsh treatment by his supervisors. (Tr. 47). On May 21, 1992, he admitted himself to the hospital where Dr. Bridges reported that Claimant had a generalized anxiety reaction from physical and sexual abuse as a child. (CX 3, p. 2). Claimant had symptoms of acute anxiety bordering on panic, but he improved significantly and requested to be discharged as an outpatient. *Id*. On June 4, 1992, however, Claimant returned to the hospital indicating that he could not live at home because he felt he was going to physically harm his child and he was experiencing homicidal ideations. *Id*. at 3. Claimant heard voices and requested treatment at East Mississippi State Hospital. *Id*.

From 1992 to 1995 Claimant held numerous jobs as a laborer, none of which lasted any more than a few months. (Tr. 58-68, 96-100). On June 8, 1995, Claimant presented to Dr. Longnecker's clinic complaining of pain that prohibited him from walking long distances. (CX 6, p. 2). On a follow-up visits in September 1995, Claimant also complained that his head was hurting. *Id*. at 3. On September 21, 1995, a MRI of the lumbar spine without contrast indicated that Claimant had early degenerative changes and slight bulge of the L4-5 disc. *Id*. at 4. Subsequent to his visit with Dr. Longnecker in 1995, Claimant continued to hold various laborer jobs without being able to hold any position for any significant length of time. (Tr. 58-68, 96-100).

In 1998, Claimant experienced a deterioration of his physical condition and sought treatment with Dr. Longnecker. (Tr. 53). On May 20, 1998, Dr. Longnecker performed a physical exam that revealed pain in the lower back on bending, mildly positive straight leg raises on the left, and some subjective numbness. (CX 6, p. 14). Due only to the continuation of Claimant's pain and its progressive nature, Dr. Longnecker recommended a myleogram CT scan. *Id*. A CT of the lumbar spine with contrast was performed on June 6, 1999, revealing a very minimum disc bulge at L4-5 with no signs of compression upon the nerve root or neural foramina or spinal stenosis. *Id*. at 13. An x-ray of the lumbar spine was normal, and the myleogram picked up the same abnormality as the CT scan. *Id*. at 12. These results reaffirmed that Claimant did not need surgery, but Claimant clearly had subjective sciatic symptoms. *Id*. at 11. As a final diagnosis, Dr. Longnecker opined that Claimant had degenerative disc disease causally related to his 1990 workplace accident and estimated Claimant sustained a two percent total body loss with further work restrictions of no heavy lifting, bending or stooping. *Id*. Claimant could occasionally lift up to twenty pounds and should avoid stair climbing

and ladders. *Id*.

During Hurricane George, on September 28, 1998, Claimant was involved in an automobile accident. (Tr. 71). Although he did not go to the hospital, Claimant injured his right shoulder, and Dr. Longnecker reported on November 4, 1998, that the accident caused grinding in the acromioclavicular area and an x-ray revealed a possible fracture in the clavical. (CX 6, p. 8). By February 9, 1999, however, Claimant reported to Dr. Longnecker that his shoulder was better. (EX 9, p. 16). On May 27, 1999, in a "To Whom It May Concern" letter, Dr. Longnecker stated that he had reviewed the records from Dr. Enger that released Claimant to work without any permanent disability. *Id*. at 17. After a review of those records, Dr. Longnecker changed his opinion on the extent of Claimant's disability stemming from his workplace accident stating that had he known about Claimant's prior history, and that Claimant had not worked gainfully, and that Dr. Enger found no objective basis to substantiate Claimant's reports of pain, Dr. Longnecker would have agreed with Dr. Enger in assigning no permanent impairment and no restrictions. *Id*.

On June 17, 1999, Dr. Jackson, a neurologist, performed a neurological evaluation of Claimant in relation to injuries he sustained in 1990. (CX 4, p. 8).On physical exam, Dr. Jackson noted that Claimant had trigger points in the cervical spine that did not correlate to his physical symptoms. *Id*. at 9. Claimant's range of motion in the lumbar spine was limited to eighty degrees, but Dr. Jackson stated that most of the limitation was due to voluntary guarding. *Id*. Claimant also had a decreased sensation in the left hand in the C8-T1 distribution and a loss of sensation in the left foot possibly attributable to the L4 distribution. *Id*. Claimant was also hypo-reflexive in the upper extremities. *Id*. Dr. Jackson stated that the only possible explanation for such symptoms was a cervical spine abnormality, but there was little evidence to suggest such a cause. *Id*. at 9. Further neurological intervention was not warranted and Claimant would not benefit from any neurological therapeutic intervention. *Id*. Dr. Jackson opined that Claimant could return to a "medium to medium light" level of work, but limited Claimant's ability to do things above ninety "degrees elevation in the shoulder with prolonged fixed adverse posturing of the neck" and Claimant should avoid "working in a bent over or stooped over fashion respecting all limitations which have previously been issued by Dr. Longnecker and his other physicians." *Id*. Finally, Dr. Jackson opined that Claimant's neck complaints were more likely related to his motor vehicle accident than his 1990 workplace accident. *Id*. at 10.

On July 22, 1999, Dr. Jackson reported that after considering the diagnostic data from Dr. Enger, there did not appear to be any basis for Claimant's symptoms other than a strong functional overlay. (CX 4, p. 5). On July 30, 1999, Claimant returned to Dr. Longnecker for a follow up regarding lower back pain. (EX 9, p. 18). Claimant also reported headaches, left sided numbness, lower back and left leg pain, none of which made much sense to Dr. Longnecker from a physiologic standpoint. *Id*.

Regarding Claimant's neck symptoms, Dr. Jackson stated on October 4, 1999, that Claimant's "neck symptoms were of no consequence until the patient was involved in a motor vehicle accident and then became symptomatic at a much later date than the initial work injury." (CX 4, p. 1). Dr.

Jackson further opined that "the neck symptoms are not to a reasonable probability connected to the original work-related injury nor [do] the descriptions of the type of injury sustained appear to substantiate neck-related complaints." *Id*. Dr. Jackson further stated that an MRI and an EMG/nerve conduction study should be done to exclude any cervical abnormalities, but it would not be related to Claimant's work related injury. *Id*.

On July 31, 2000, Claimant presented to Dr. Millette, a neuro ophthalmologist, complaining of back pain as well as numbness and weakness in the left arm dating back to his 1990 work-related accident. (CX 5, p. 7). After a physical examination, Dr. Millette opined that Claimant likely had mechanical lumbar pain and left body paraesthesias intermittently of undetermined etiology. *Id*. at 8. On October 11, 2000, Claimant returned to Dr. Millette complaining of dystonic posturing of the left hand. *Id*. at 6. On March 6, 2001, Dr. Millette conducted an unremarkable physical examination and opined that Claimant now only had left body paresthesia with subjective weakness. (CX 5, p. 5). To be absolutely complete, however, Dr. Millette ordered a MRI of Claimant's brain, which though otherwise normal, revealed "vague increased signal to white matter tracts of parietal and occipital lobes bilaterally." *Id*. at 4. The significance of his finding led the radiologist to opine that Claimant may have HIV. *Id*.

B. Claimant's Testimony

Claimant testified that after graduating from Moss Point High School in 1986, as a learning disabled student, he began to work for Gulf City Fisheries packaging frozen shrimp. (Tr. 41-42). Claimant also obtained a job with Boh Brothers Construction as a laborer in a bridge project. (Tr. 42). In 1990 Claimant began working for Employer as a chipper, a job that entailed grinding weld seams with surface grinders, bulkeye, burr motors, offsets, and needle guns. (Tr. 43). Sometime Claimant was required to carry air hoses weighing about one-hundred and fifty pounds. (Tr. 87). Prior to working for Employer, Claimant described himself as a "strong young man" with no physical problems. (Tr. 49). Claimant's only prior injury occurred while paying basketball when his left knee just started hurting. (Tr. 91-92). Regarding that injury, Claimant stated that he underwent a successful surgery and his knee was no longer bothering him. (Tr. 93).

On June 26, 1990, Claimant was assigned to a clean up job in an area that had three or four strongbacks - strips of steel about ten feet long and an inch thick - which Claimant was required to move. (Tr. 44). While picking up a strongback, Claimant felt his back "pop" and his supervisor called an ambulance to remove him from the ship. (Tr. 44). Claimant was take to Employer's infirmary and subsequently referred to Dr. Enger. (Tr. 46).

Claimant was not happy with his treatment from Dr. Enger because Dr. Enger did not help his physical condition but only mentally abused him. (Tr. 47). Claimant returned to work at light duty but shortly thereafter Employer had Claimant resume his regular duties which Claimant alleged he was not physically able to perform. (Tr. 47). Nevertheless, Claimant stated that he was good at his job and Employer offered him a supervisor position if he would stay on the job. (Tr. 116-17). Although he started at $7.13 per hour, by the time Claimant left he was being paid $9.00 per hour.

(Tr. 117-18).

Claimant testified that he was officially terminated in 1992, but he did not know exactly why he was fired. (Tr. 49). Around the time Claimant was fired he spent some time in East Mississippi Hospital for mental problems. (Tr. 49-50). Part of Claimant's mental problems originated with Rick Morehead, a supervisor, who "cussed," "low-rated," and called Claimant "everything but a child of God." (Tr. 50). Mr. Morehead berated Claimant because he did not think anything was physically wrong with him. (Tr. 50-51).

After leaving Employer, Claimant performed labor type work for numerous employers prior to seeing Dr. Longnecker in 1995. (Tr. 51-52). No job lasted very long because Claimant stated that his physical condition kept him form long term employment. (Tr. 52). Claimant began treatment with Dr. Longnecker in 1995 because he "needed someone to . . . treat [him] fairly for [his] condition." (Tr. 52). After treating with Dr. Longnecker in 1995, Claimant went back to work as a laborer, and went to a truck driving school. (Tr. 52-53). Claimant returned to Dr. Longnecker in 1998 because Claimant felt as if his condition was deteriorating since his workplace accident in 1990, and his last visit with Dr. Longnecker in 1995. (Tr. 53). Claimant feared that unless he received proper treatment he would become paralyzed. (Tr. 55). Claimant described his pain as follows:

> Well, my back start bothering me when I get up and do a lot of bending over, do a lot of climbing, do a lot of sitting. When I usually sit long, it hurt. If I pick up anything, stuff like that, things like that to that nature. I try to drive, especially a truck, and mostly now when I drive a truck, I can't shift, I can't mash the clutch and then slide. But usually when I get my release from is when I'm just laying straight on my back. . . . [I have l]ower leg pains, freezing at the legs, numbness. Can't feel the numb part of my body down below my [left] leg. . . . And my back, I don't feel nothing. It just gets so numb, I just don't feel anything in my leg, period. And there's sharp pains that go down my left leg. . . . It's like 90 percent every day. I have pain constantly every day.

(Tr. 54-55).

Things that aggravate Claimant's condition include bending over, picking something up and standing. (Tr. 55). After treating with Dr. Longnecker in 1998, Claimant worked for two or three weeks for Accu-Fab as a laborer and had to leave because he was not able to bend over. (Tr. 58). Claimant also worked for Sabre as a laborer in Philadelphia for one week but had to leave because he was not able to pay his costs of living. (Tr. 60). Regardless of the costs of living expenses, Clamant testified that he would not have been able to stay much longer because he was in constant pain. (Tr. 61). Claimant also worked for Friede Goldman Offshore for about two months as a welder's helper but he was unable to perform that job secondary to back pain and was terminated for complaining about his problem. (Tr. 62).

Realizing that he could no longer pursue an occupation as a laborer, Claimant began driving trucks, but that job did not last long either because Claimant had trouble sitting and shifting gears. (Tr. 63). Claimant also spent two months as a garbage man jumping on and off the truck. (Tr. 67). During

that time Claimant experienced constant pains, stiffness, and weakness. (Tr. 67). Clamant briefly worked at a wood processing plant but had to quit because it required constant bending. (Tr. 68). On cross-examination, Clamant related that after 1992 he had also worked for short periods of time for: Halter Marine, Moss Point Marine, Flour Daniel Construction Co., Beacon, , Boots Construction Co., and Sea Chick. (Tr. 96-99). Claimant was terminated from Sea Chick because he lied on his application, terminated from Boots Construction Co. because another employee was harassing him, terminated from Flour Daniels because another employee attempted to stab him, and terminated by Employer. (Tr. 99-100). Claimant testified that he had looked for other jobs within Dr. Longnecker's restrictions but had not found anything available to him. (Tr. 69). Claimant testified that he is currently disabled from even sedentary work because sitting tires him out and he must be able to stand and move around. (Tr. 88-89). Claimant has a limited ability to make change and cannot read or write very well. (Tr. 89).

During Hurricane George, on September 28, 1998, Claimant was involved in an automobile accident. (Tr. 71). Although he did not go to the hospital, Claimant injured his right shoulder, but stated that the injury had nothing to do with his claim for his low back injury. (Tr. 73). Claimant had two prior stabbing injuries, on in the mid to late 1980s that necessitated a few stitches, and another in 1999 that nearly that necessitated a blood transfusion and cost Claimant his life. (Tr. 75-79, 106). Currently, Claimant stated that he had no physical problems related to either stabbing. (Tr. 81). Two years prior the hearing, Claimant stated he visited Dr. Huntwork who opined that Claimant had fibromyalgia.[3] (Tr. 82). Claimant testified that the condition did not require him to seek constant medical treatment and did not keep him from working. (Tr. 83). Claimant also stated that he takes medication for psycho-emotional problems such as manic depression. (Tr. 83). Claimant also testified that he was currently on probation for a guilty plea in a child molestation charge. (Tr. 84-86).

On cross-examination Claimant denied that he ever approached Dr. Enger about obtaining a job as a forklift operator at Employer's facility. (Tr. 105). Claimant also admitted to being part of a class action suit regarding some drugs he had taken. (Tr. 109-10). Claimant was unable to articulate the adverse side affects of the medicine that he took. (Tr. 110-11). The basis for the lawsuit, however, occurred over a stomach problem several years after Claimant's workplace injury. (Tr. 111).

C. Testimony of Melinda Wiley

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[3] Dr. Huntwork's impression that Claimant had fibromyalgia was not developed in the record. Fibromyalgia is a widespread musuloskeletal pain and fatigue disorder of unknown cause. Fibromyalgia merely means pain in the muscles, ligaments and tendons, often described as deep muscular aching, burning, throbbing, shooting and stabbing pain generally concentrated in muscle grous that are used continuously. Traumatic accidents are one possible trigger thought to participate the onset of the underlying syndrome. *See* Fibromyalgia Network, *Fibromyalgia Basics - Symptoms, Treatments and Research* <http://www.fmmetnews.com/pages/basics.html> (Visited June 26, 2002).

Ms. Wiley, a twenty-nine year veteran employee relations representative for Employer, serves to assist employees returning to work after an injury who have permanent work restrictions. (Tr. 120). She also handled all employee-related activities and EEOC matters. (Tr. 120). Employer has a collective bargaining agreement with its unions, and in those agreements there are mandatory procedures regarding excused and un-excused absences. (Tr. 120-21). All new employees have a day for orientation where Ms. Wiley provides them with the regulations and each employee must sign a form acknowledging that they were advised of those rules. (Tr. 121). Under those guidelines, an employee may have a medical leave of absence for up to one year provided the employee comply with monthly reporting requirements. (Tr. 122). Claimant was terminated on June 25, 1992 for failure to return from a leave of absence. (Tr. 122).

Employer also allowed a grace period by sending a certified letter thirty days after the employee last worked advising that employee of the reporting requirement. (Tr. 122). Additionally, if an employee is not satisfied with his termination, Employer had a grievance procedure outlined in the labor agreement. (Tr. 122-23). Claimant did not file a grievance and Ms. Wiley stated that Claimant was eligible for re-employment in the event Employer has openings. (Tr. 123). Ms. Wiley further testified that the air hoses that Claimant was required to carry each weighed up to thirty-five pounds and OSHA regulations require that no individual carry greater than fifty pounds at one time. (Tr. 124).

D. Exhibits

(1) Medical Records from Employer's Infirmary

Claimant reported his June 26, 1990 workplace accident to Employer's infirmary on the morning of June 27, 1990, complaining of lower back strain after lifting a long piece of steel. (CX 1, p. 39). Claimant then signed a form to select Dr. Enger as a treating physician, and after Dr. Enger opined that Claimant could return to work after his initial visit, Claimant refused to return to work within his set restrictions. *Id*. at 30, 32. Claimant obtained new work restrictions, set on July 2, 1990, which merely limited his use of burr motor, chipping guns, and surface grinders for a two week period of time. *Id*. at 29. By July 13, 19990, however, Claimant agreed to work within a new set of restrictions that limited lifting to less than thirty-five pounds for a period of two weeks, but by July 25, 1990, he again refused to work secondary to back pain. *Id*. at 27, 30.

(2) Medical Records of Dr. Daniel J. Enger

Dr. Enger, an orthopaedic surgeon, first treated Claimant on June 29, 1990, opining that Claimant was suffering from back strain and functional overlay. (CX 1, p. 34-35). Routine x-rays did not demonstrate any defects and Claimant also reported pre-existing injuries to is left knee and right ankle. *Id*. at 34. On a physical examination Dr. Enger noted a normal thoracic kyphosis and lumbar lordosis. *Id*. Dr. Enger opined that Claimant was fit for light work at the time of his visit and opined that Claimant could "remain on the job" if he used a back corset. *Id*. at 35. Dr. Enger, however, was disturbed that Claimant had only been working one month and was already complaining

of back pain, which caused Dr. Enger to question whether Claimant's pre-existing conditions were listed on his pre-employment physical. *Id*.

On July 27, 1990, Dr. Enger reported that after several visits he found little in the way of objective evidence to substantiate Claimant's reports of back pain. (CX 1, p. 24). Because Claimant stated that he could not return to work, Dr. Enger ordered an MRI to ascertain whether there was some degeneration of the disc material. *Id*. Based on Claimant's history, which included voluntary withdraw from strenuous physical activities in high school sports, Dr. Enger predicted that diagnostic testing would not pick up anything objective and that Claimant was merely using the injury to be transferred to a more desirable job as a forklift operator. *Id*. at 25.

In a report dated August 14, 1990, Claimant reported that his pain level would go up and down, and Dr. Enger told him that he did not know the origin of Claimant's problem. (CX 1, p. 22). Additionally, finding no contraindication based on Claimant's physiotherapy, Dr. Enger found no reason why Claimant could not return to work as a chipper, limited to working "downhand" for four to six weeks with no overhead grinding. *Id*. Claimant's desire to become a forklift operator was an administrative decision, not a medical one. *Id*. On September 13, 1990, Dr. Enger remarked that x-rays, a bone scan, a myelogram of the entire cervical, thoracic and lumbar spine with CAT scanning were all normal. *Id*. at 20. A MRI of the lumbar spine showed only degeneration at L4-5 with loss of water content but had no evidence of disc herniation. *Id*. Likewise an arthritic work-up was normal. *Id*. Accordingly, Dr. Enger released Claimant to undergo a trial of regular duties at work. *Id*. Dr. Enger continued his request that Claimant work "downhand," with limited chipping and no overhead work. *Id*. at 18. On September 26, 1990, Dr. Enger noted that Claimant continued to complain of pain even working within his restrictions, but because Claimant's work up was negative, Dr. Enger stated that Claimant could remain on the job. (EX 8, p. 12).

On October 24, 1990, Claimant continued to complain of back pain and that his work as a chipper aggravated his condition. (CX 1, p. 14). Dr. Enger opined that moving Claimant to transportation might take Claimant off the sick call list. *Id*. at 15. Claimant stated that Employer offered him "downhand" work, eliminated overhead duties, eliminated grinding duties on an inclined plane, but Claimant stated that he still could not perform his assigned tasks secondary to pain. *Id*. Based off a pain pattern picture prepared by Claimant, Dr. Enger could not think of any medical syndrome other than the fact that there was a strong possibility that Claimant was a symptom magnifier. *Id*. Dr. Enger related that Claimant desired "to be pulled from work, be placed on workers' compensation, and have continued physiotherapy." *Id*. Medically there was not any reason to follow that course of action and Dr. Enger informed Claimant that there was nothing more he could do to treat him. *Id*. at 17. Nevertheless, Dr. Enger opined that Claimant likely experienced pain due to a minimal loss of water content at the L4-5 disc. *Id*. at 14. Due to continuing reports of pain Dr. Enger scheduled a repeat MRI and on November 16, 1990, Dr. Enger reported that there was no change in Claimant's condition, but nevertheless he continued Claimant's restrictions for another three weeks. (CX 1, p. 12).

On March 15, 1991, Dr. Wiggins referred Claimant to Dr. Enger for a second opinion

regarding Claimant's knee complaints. (CX 1, p. 10). Claimant had underwent surgery for his ankle and also had an arthroscopy of his left knee. *Id*. Dr. Wiggins released Claimant to return to work on March 4, 1991, and Employer refused to take Claimant back as a chipper because that work entails a lot of squatting, kneeling and climbing. *Id*. Dr. Wiggins opined that Claimant had reached the end of medical treatment for his knee in light of the normal results from the arthroscopy and stated that unless Dr. Enger could think of another treatment Claimant would have to live with the problem and search for a new job. *Id*. at 10-11.

On June 5, 1991, Dr. Enger described Claimant's symptoms as migrating faster than he was able to do diagnostic work-ups and that Claimant's symptoms were bizarre: "he will get about half way up, go through a gyration, put his hands to his back, then jerk his body, and come upright." (CX 1, p. 6). Dr. Enger could not assign any permanent disability rating as there was no objective findings present. *Id*. at 7. On January 22, 1992, Dr, Enger noted that Claimant no longer worked for Employer for "personal reasons." *Id*. at 1. Claimant also reported that he could not turn his neck because it "hurts his brain." *Id*. Finding nothing to objectively verify Claimant's symptoms, apart from limited motion in arm raises, Dr. Enger ordered a CPK just to make sure he was not dealing with some bizarre musculoskeletal condition, and he returned Claimant to work without restrictions. *Id*. at 1-2.

(3) Medical Records from Springhill Memorial Hospital

An MRI of Claimant's lumbar spine on November 1, 1990 revealed a degenerated L4-5 disc that was slightly bulging but not herniated. (CX 2, p. 5). A comparison with Claimant's July 31, 1990 study reveled no changes. *Id*.

(4) Medical Records of William D. Bridges

On May 21, 1992, Dr. Bridges noted that Claimant was admitted to the hospital with a generalized anxiety reaction from physical and sexual abuse as a child. (CX 3, p. 2). Claimant had symptoms of acute anxiety bordering on panic, but he improved significantly and requested to be discharged as an outpatient. *Id*. On June 4, 1992, however, Claimant returned to the hospital indicating that he could not live at home because he felt he was going to physically harm his child and he was experiencing homicidal ideations. *Id*. at 3. Claimant heard voices and requested treatment at East Mississippi State Hospital. *Id*. Claimant was discharged on June 16, 1992 awaiting a bed in the state facility. *Id*. On July 9, 1992, Claimant presented to a hospital emergency room with complaints of "I feel funny." *Id*. at 4. On a follow-up visit Dr. Bridges noted that Claimant was still suffering from severe anxiety and that Claimant was twice married with five children. *Id*. at 5.

Treatment notes from November 16, 1998 indicate that Claimant had many problems: he acted confused and off balance, he had ringing in the ears, he could not relax, and sharp noises caused him to become jittery. (CX 3, p. 8). Detailing a shocking family history of abuse, Claimant's treatment notes documented bladder spasms in December 1998. *Id*. at 8-9.

(5) Medical Records and Deposition of Dr. M. F. Longnecker

On June 8, 1995, Claimant presented to Dr. Longnecker's clinic complaining of pain that prohibited him from walking long distances. (CX 6, p. 2). On follow-up visits in September 1995, Claimant also complained that his head was hurting and he complained specifically of continued headaches. *Id*. at 3. On September 21, 1995, a MRI of the lumbar spine without contrast indicated that Claimant had early degenerative changes and slight bulge of the L4-5 disc. *Id*. at 4.

Dr. Longnecker did not treat Claimant again until May 20, 1998, when Claimant presented with back and left leg pain. (CX 6, p. 14). A physical exam revealed pain in the lower back on bending, mildly positive straight leg raises on the left, and some subjective numbness. *Id*. Due only to the continuation of Claimant's pain and its progressive nature, Dr. Longnecker recommended a myleogram CT scan. *Id*. A CT of the lumbar spine with contrast was performed on June 6, 1999, revealing a very minimum disc bulge at L4-5 with no signs of compression upon the nerve root or neural foramina or spinal stenosis. *Id*. at 13. An x-ray of the lumbar spine was normal , and the myleogram picked up the same abnormality as the CT scan. *Id*. at 12.

On June 16, 1998, Dr. Longnecker stated that Claimant did not need surgical intervention, but he was certainly having subjective sciatic symptoms. (CX 6, p. 11). As a final diagnosis, Dr. Longnecker opined that Claimant had degenerative disc disease dating back to 1990 and estimated Claimant sustained a two percent total body loss with further work restrictions of no heavy lifting, bending or stooping. *Id*. Claimant could occasionally lift up to twenty pounds and should avoid stair climbing and ladders. *Id*. In an October 12, 1998 letter to Claimant's attorney Dr. Longnecker stated:

> I would assume that all of these problems with his back relates back to his original injuries of June 26, 1990. That historically is when he had the problem and therefore in my opinion this has to be causatively related to that. As far as his inability to work again this is a subjective thing he states he hurts all the time and was not able to work from apparently when I first saw him in 1995 through the hiatus of three years until I saw him again May and June of this year. From a clinical standpoint to say that he was totally incapacitated and unable to earn any type of income is again strictly subjective. In order to give him the benefit of the doubt I would say that temporary total disability was from the time I saw him in May of this year through most recent and current and MMI has been obtained with the percentage loss that I have already indicated. Further medical would only be supportive in nature in my opinion and I do not in any way anticipate surgical intervention.

(CX 6, p. 9).

On November 4, 1998, Dr. Longnecker reported that an epidural injection afforded Claimant no relief. (CX 6, p. 8). Claimant was also in a car wreck in which he injured his right shoulder that caused grinding in the acromioclavicular area and an x-ray revealed a possible fracture in the clavicle.

Id. On the request of Claimant, Dr. Longnecker referred him to Dr. Jackson for a neurological work up. *Id*.

On February 9, 1999, Claimant reported to Dr. Longnecker that his shoulder was better and another work up of Claimant's back reaffirmed Dr. Longnecker's conclusion that no surgery was warranted from an orthopaedic standpoint. (EX 9, p. 16). On May 27, 1999, in a "To Whom It May Concern" letter, Dr. Longnecker stated that he had reviewed the records from Dr. Enger that released Claimant to work without any permanent disability. *Id*. at 17. Reflecting that he had assigned a two percent permanent disability rating to Claimant based off: minimal bulging at L4-5 and L5-S1 levels, the "chronicity" of the problem, and the fact that surgery was not warranted, Dr. Longnecker reconsidered his opinion. *Id*. Had he known about Claimant's prior history, and that Claimant had not worked gainfully, and that Dr. Enger found no objective basis to substantiate Claimant's reports of pain, Dr. Longnecker would have agreed with Dr. Enger in assigning no permanent impairment and no restrictions. *Id*.

On July 30, 1999, Claimant returned to Dr. Longnecker for a follow up regarding lower back pain. (EX 9, p. 18). Claimant also reported headaches, left sided numbness and lower back and left leg pain. *Id*. None of these complaints made much sense to Dr. Longnecker from a physiologic standpoint. *Id*. Dr. Longnecker was not ready to turn Claimant lose with a clean bill of health, however, until Dr. Millet was able to see him and do a complete evaluation. *Id*.

The parties deposed Dr. Longnecker post-hearing. (CX 17, p. 1). Regarding his "To Whom It May Concern" letter Dr. Longnecker stated:

> Now, I did write a letter To Whom It May Concern, which is probably what this is all about today. That was after a conference with a nurse practitioner from Ingalls, Ms. Regina Ethridge, and she brought records to me from Dr. Dan Enger. Dr. Enger had released this patient without any permanency, and found nothing, basically, abnormal. Pretty consistent with our findings. And specifically she had asked me had I been aware that Dr. Enger had released him with no permanency after following him for that period of time, would I have probably not given him a permanency, and I said yes, I probably would not have.
>
> I didn't alter the fact of my opinion. I did, in fact, give him the permanency in trying to clear the water, or clear the air to resolve this issue. I think there is no question about, this gentleman has a lot of subjective complainants, which it is difficult to correlate with any real objective findings, but this has gone on for 10, 12 years. He does have some manifest evidence of degenerative disc disease in his back. And in order to be fair and equitable, I did give him two percent total body loss, and I will stand by that at this point.

(CX 17, p. 11-12).

In making the causal connection between Claimant's current condition and his workplace injury, Dr. Longnecker stated that the causation was difficult for him to see. (CX 17, p. 31-32). From a historical point of view, Claimant suffered an accident in the shipyard and his problems followed that accident. *Id*. at 32. Thus, without any reason to believe otherwise, and being unaware of any interceding injuries, Dr. Longnecker made the causal connection to Claimant's workplace accident. *Id*.

On cross-examination, Dr. Longnecker related that Dr. Enger was in the best position to make a determination and diagnosis of Claimant's physical condition. (EX 17, p. 25). Dr. Longnecker based his opinion off his several office visits with Claimant and his subjective complaints and related that he gave Claimant a "qualified two percent" impairment rating. *Id*. at 25-26. Although testing did not reveal much in the way of organic problems, that did not mean that Claimant was without mechanical problems. *Id*. at 26. Claimant had a degenerative disc and to say that nothing was wrong was "not fair." *Id*. Dr. Longnecker was willing to compromise the situation because there was nothing more he could do for him, he was tired of hearing about Claimant's complaints and repeating very expensive diagnostic tests. *Id*. at 27. Apart from Claimant's disc bulge and degenerative condition, Dr. Longnecker stated that without Claimant's subjective complaints, he could never prove there was anything absolutely wrong with Claimant. *Id*. at 28.

(6) Medical Records of Joe E. Jackson

On June 17, 1999, Dr. Jackson, a neurologist, performed a neurological evaluation of Claimant in relation to injuries he sustained in 1990. (CX 4, p. 8). Dr. Jackson related that Claimant had hurt his shoulder in a 1998 motor vehicle accident, but those shoulder symptoms disappeared quickly and were unrelated to his complaints about his neck and left arm. *Id*. Claimant was also taking anti-hypertensive agents for episodes of shaking that he related to his workplace accident. *Id*. On physical exam, Dr. Jackson noted that Claimant had trigger points in the cervical spine that did not correlate to his physical symptoms. *Id*. at 9. Claimant's range of motion in the lumbar spine was limited to eighty degrees, but Dr. Jackson stated that most of the limitation was due to voluntary guarding. *Id*. Claimant also had a decreased sensation in the left hand in the C8-T1 distribution and a loss of sensation in the left foot possibly attributable to the L4 distribution. *Id*. Claimant as also hypo-reflexive in the upper extremities. *Id*. Dr. Jackson stated:

> The only possible explanation for an injury lasting this long with these complaints would be some type of upper cervical disc herniation with spinal cord encroachment or even possible tear with Syrinx formation. There is little to strongly suggest this other than the mild weakness at C8, T1 distribution of the left arm, the low back has been more than adequately evaluated with only degenerative changes. Nothing requiring surgery based on the information which we have received . . . . Additional low back work up or treatment is clearly not warranted.

(CX 4, p. 9).

Dr. Jackson also recommended an MRI of the cervical spine but only related it to Claimant's workplace accident if Claimant had complained about neck and arm symptoms following his workplace injury. (CX 4, p. 9). Further neurological intervention was not warranted and Claimant would not benefit from any neurological therapeutic intervention. *Id*. Dr. Jackson opined that Claimant could return to a "medium to medium light" level of work, but limited Claimant's ability to do things above ninety "degrees elevation in the shoulder with prolonged fixed adverse posturing of the neck" and Claimant should avoid "working in a bent over or stooped over fashion respecting all limitations which have previously been issued by Dr. Longnecker and his other physicians." *Id*. Finally, Dr. Jackson opined that Claimant's neck complaints were more likely related to his motor vehicle accident than his 1990 workplace accident. *Id*. at 10.

On July 8, 1999, Claimant's attorney wrote to Dr. Jackson after Employer stopped paying benefits for any problems Claimant experienced on his left side as they were not related to his workplace accident. (CX 4, p. 7). Claimant's attorney sent records from Dr. Longnecker and Dr. Enger showing that Claimant had complained of left sided pain throughout his course of treatment. *Id*. Meanwhile, Dr. Jackson cancelled Claimant's August 2, 1999 appointment as there was nothing that Dr. Jackson felt he could offer Claimant. *Id*. at 6. On July 22, 1999, Dr. Jackson responded to Claimant's attorney that the records he sent did not clearly confirm any cervical spine complaints following his workplace accident. *Id*. at 5. Rather, after considering the diagnostic data from Dr. Enger, there did not appear to be any basis for Claimant's symptoms other than a strong functional overlay. *Id*. Claimant simply had no significant pathology and the only positive signs Claimant exhibited were: pain and tenderness on palpitation, voluntary restriction of range of motion, and subjective sensory losses. *Id*. Dr. Jackson did not think that any of these findings warranted further medical intervention. *Id*.

On August 5, 1999, Claimant's attorney wrote to Dr. Jackson again, this time detailing medical records from Drs. Enger and Longnecker showing that Claimant had long complained about left sided and neck problems stemming from his 1990 workplace accident. (CX 4, p. 2-4). On October 4, 1999, Dr. Jackson wrote to Carrier's case manager, Regina Etheridge, reaffirming his July22, 1999 exam and findings. *Id*. at 1. Specifically, Dr. Jackson stated that Claimant's "neck symptoms were of no consequence until the patient was involved in a motor vehicle accident and then became symptomatic at a much later date than the initial work injury." *Id*. Accordingly, Dr. Jackson opined that "the neck symptoms are not to a reasonable probability connected to the original work-related injury nor [do] the descriptions of the type of injury sustained appear to substantiate neck-related complaints." *Id*. Dr. Jackson further stated that an MRI and an EMG/nerve conduction study should be done to exclude any cervical abnormalities, but it would not be related to Claimant's work related injury. *Id*.

(7) Medical Records of Terry J. Millette

On July 31, 2000, Claimant presented to Dr. Millette, a neuro ophthalmologist, complaining of back pain as well as numbness and weakness in the let arm dating back to a 1990 work-related accident. (CX 5, p. 7). After a physical examination, Dr. Millette opined that Claimant likely had

mechanical lumbar pain and left body paraesthesias intermittently of undetermined etiology. *Id*. at 8. On October 11, 2000, Claimant returned to Dr. Millette complaining of dystonic posturing of the left hand. *Id*. at 6. Dr. Millette's new impressions were questionable dystonic posturing of the left hand and dysphoria. *Id*.

On March 6, 2001, Dr. Millette conducted an unremarkable physical examination and opined that Claimant now only had left body paresthesia with subjective weakness. (CX 5, p. 5). To be absolutely complete, Dr. Millette ordered a MRI of Claimant's brain. *Id*. That test was performed on March 9, 2001, and revealed that Claimant had "vague increased signal to white matter tracts of parietal and occipital lobes bilaterally." *Id*. at 4. The significance of his finding led the radiologist to opine that Claimant may have HIV. *Id*. The data was otherwise normal. *Id*.

(8) Vocational Report of Walker & Associates

On April 26, 1999, Katrina Sekul-Vidren, a vocational consultant, prepared a hypothetical vocational analysis and labor market survey to document suitable alternative employment opportunities retroactive to June 16, 1998, the date Dr. Longnecker assigned work restriction to Claimant and to perform a second labor market survey as of April 26, 1999. (EX 14, p. 1). Based on Claimant's age, education, work history, and physical limitations, Ms. Sekul-Vidren identified the following positions:

June 16, 1998

Valet Attendant	$6.00 per hour	Treasure Bay Casino
Security Guard	$6.00 per hour	Treasure Bay Casino
Steward	$6.00 per hour	Treasure Bay Casino
Busboy	$6.00 per hour	Treasure Bay Casino
Cashier	$6.00 per hour	Treasure Bay Casino
Cashier	$6.15 per hour	T-Shirt City Souvenir Stores
Front Desk Clerk	$?	Super 8 Motel
?	$?	Wendy's

April 26, 1999

Cashier	$6.50 per hour (32 hour wk)	Interstate Station Convenience Store
Front Desk Clerk	$6.50 per hour	Super 8 Motel
Cashier	$5.15 per hour	Wendy's
Grill Attendant	$5.15 per hour	Wendy's
Security Guard	$5.15 per hour	Newman Lumbar Company
Valet Dispatcher	$6.00 per hour	Grand Casino

(EX 14, p. 6-7)

V. DISCUSSION

A. Contention of the Parties

Claimant contends that his average weekly wages should be computed at $277.85 per week in 1990 dollars according to Section 10(c) of the Act, computed by dividing his total earnings ($944.73) by the total number of days worked prior to his injury (17), and multiplying that number by 260. Claimant also contends that he reached maximum medical improvement on June 16, 1998, the day Dr. Longnecker released Claimant from treatment and assigned permanent restrictions. Arguing that his former job does not fall within the work restrictions set by Dr. Longnecker, Claimant contends that he established a *prima facie* case of total disability. Furthermore, Claimant asserts that his repeated failure to hold down any job shows that he diligently tried to find other employment but was unable to do so establishing that his disability is total and permanent. Alternatively, Claimant contends that Employer failed to show suitable alternative employment in light of Claimant's subjective complaints and illiteracy. Again in the alternative, Claimant contends that he is entitled to a permanent partial disability payment of $58.76 per week.

Employer contends that Claimant only suffered a minor strain at work on June 26, 1990 and failed to meet his burden of proving causation between his current condition and his workplace injury. Dr. Enger, Claimant's treating physician was unable to ascertain any objective findings and he released Claimant to return to work with no disability rating. Employer further argues that Claimant is not a credible witness based on inconsistent statements and Claimant's history. Additionally, Dr. Longnecker's opinion that there was a causal relationship between Claimant's current condition and his workplace accident was based on an inaccurate history. Alternatively, Employer contends that Claimant reached maximum medical improvement on September 21, 1990, the date Claimant was released to return to work by Dr. Enger. Claimant was able to return to his former job and continued working at his former job until undergoing surgery for a non-related knee injury. Again in the alternative, Employer contends that it showed suitable alternative employment through its labor

market survey conduced by Walker and Associates. Employer further contends that Claimant's average weekly wage should be calculated at the minimum amount due to Claimant's history of keeping jobs for only short periods of time and Claimant should not receive the benefit of wages as if he had worked continuously and diligently.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). A claimant's discredited and contradicted testimony is insufficient to support an award. *Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65 (5th Cir. 1980); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129, 131 (1988); *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981).

Here, based on the record as a whole, and my observation of Claimant's demeanor, I find that Claimant is an incredible witness. Employer pointed out two inconsistent statement in the record. First, in his deposition Claimant stated that he always carried a knife on him, but at trial Claimant stated that he didn't "carry stuff like that." (CX 8, p. 13; Tr. 108). Second, on several occasions, Claimant reported to Dr. Longnecker that he was not working, and was unable to work since his 1990 injury. (CX 9, p. 6, 14; CX 17, p. 16-17). In fact, Claimant held numerous jobs performing physical labor which he did not report to Dr. Longnecker. (CX 17, p. 16-17; EX 13, p. 2; Tr. 51-53).

Employer also related that Dr. Enger opined that Claimant may be engaging in symptom magnification and that his subjective pain pattern did not relate to any medical syndrome of which he was aware. (CX 1, p. 1, 15). As Dr. Enger stated on October 24, 1990: "When asked where it hurts the patient states he hurts on his left side, but then moves up to the right, and obviously the pain is moving faster than I can keep up with it, document and test for it." (CX 1, p. 15). Also, Employer points to the fact that Claimant related to Dr. Longnecker that he sought treatment in 1995 because he was in such pain that he could not perform any job, but Claimant did not seek any medical treatment between 1992 and 1995 when Claimant alleged that he held numerous jobs for only brief periods of time secondary to his pain. (Tr. 51-52).

Additionally, I note that Claimant related he no longer had knee problems after a successful surgery. (Tr. 93). Claimant never underwent surgery for his knee, however, and Dr. Wiggins related that during surgery for his ankle, he could find nothing wrong with the knee, and in fact made a referral to Dr. Enger because Claimant continued to complain of knee symptoms without an objective basis. (CX 1, p. 10-11). Also, Claimant stated that on the day of his injury he was transported by ambulance to the Employer's infirmary. (Tr. 44). Infirmary records, however, indicate that Claimant appeared at the infirmary on the morning following his injury. (CX 1, p. 39).

Finally, I note that Claimant has a long history of reporting subjective symptoms without a clear organic basis. Apart for Dr. Enger's reports which did not find any objective source for Claimant's subjective complaints, Dr. Wiggins reported that Claimant complained about knee problems but an arthroscopy revealed largely unremarkable results. (CX 1, p. 10). Nevertheless, Claimant continued to complain of knee problems but Dr. Wiggins was "loathe" to do any further procedures in light of Claimant's fairly normal examination. *Id*. at 11. Dr. Jackson reported that Claimant would not benefit from any neurological intervention and after reviewing the records of Dr. Enger and Longnecker, he reported that Claimant suffered from a strong functional overlay. (CX 4, p. 5). Even Dr. Longnecker related that he could never prove that there was ever anything absolutely wrong with Claimant. (CX 17, p. 28). Furthermore, Claimant reported to Dr. Bridges that he heard voices. (CX 3, p. 3). Based on the above factors and my observation of the witnesses demeanor at the Hearing, I find that Claimant is an incredible witness and I give little value to the weight of his testimony.

C. Causation

C(1) Section 20 Presumption

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2000); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995); *Addison v. Ryan Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 101 (1986). To rebut the Section 20(a) presumption, the Employer must present substantial evidence that a claimant's condition is not caused by a work related accident or that the work related accident did not aggravate Claimant's underlying condition. *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966); *Kubin*, 29 BRBS at 119. Here, there is no dispute that Claimant suffered a workplace accident on June 26, 1990 and that injury caused some minor impairments for which Claimant was treated by Dr. Enger and released to return to work. Rather, Claimant contends that his workplace accident caused permanent damage far beyond that recognized by Dr. Enger.

C(1)(a) Prima Facie Case

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. Here, Claimant established that he injured his back at work while lifting a heavy piece

of steel, thus, Claimant established the second element of his *prima facie* case. (Tr. 44). Dr. Longnecker causally related Claimant's workplace accident to his condition in 1998. (CX 6, p. 9; CX 17, p.). Accordingly, I find that Claimant established a *prima facie* case for compensation under the Act.

C(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work related." *Conoco, Inc.*, 194 F.3d at 687-88 (citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999)(stating that the hurdle is far lower than a "ruling out" standard).

Here there is ample evidence to rebut Claimant's *prima facie* case that his current condition is causally related to his workplace accident. Dr. Enger related that after a year of testing he was unable to determine any objective basis for Claimant's subjective complaints and on June 5, 1991, he released Claimant without assigning any permanent partial disability in regards to Claimant's back. (CX 1, p. 6). Again on January 22, 1992, Dr. Enger released Claimant to return to his former employment in the chipping department. *Id*. at 2. Accordingly, as Dr. Enger did not find any lingering disability from Claimant's workplace accident on June 26, 1990, I find that Employer has produced substantial evidence to rebut Claimant's *prima facie* showing that his current physical impairments are causally related to his workplace injury.

C(3) Causation Based on the Record as a Whole

Once the employer offers sufficient evidence to rebut the Section 20(a) presumption, the claimant must establish causation based on the record as a whole. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1981). If, based on the record, the evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994).

The only physician of record to affirmatively link Claimant's current physical condition (after

being terminated by Employer in 1992) to his workplace injury is Dr. Longnecker, whom Claimant first saw five years after his accident and three years after terminating treatment with Dr. Enger. In an October 12, 1998 letter to Claimant's attorney Dr. Longnecker stated: "I would assume that all of these problems with his back relates back to his original injuries of June 26, 1990. That historically is when he had the problem and therefore in my opinion this has to be causatively related to that." (CX 6, p. 9). In May 27, 1999, in a "To Whom It May Concern" letter, Dr. Longnecker stated that he had reviewed the records from Dr. Enger that released Claimant to work without any permanent disability. *Id*. at 17. Reflecting that he had assigned a two percent permanent disability rating to Claimant based off: minimal bulging at L4-5 and L5-S1 levels, the "chronicity" of the problem, and the fact that surgery was not warranted, Dr. Longnecker reconsidered his opinion. *Id*. Had he known about Claimant's prior history, and that Claimant had not worked gainfully, and that Dr. Enger found no objective basis to substantiate Claimant's reports of pain, Dr. Longnecker would have agreed with Dr. Enger in assigning no permanent impairment and no restrictions. *Id*.

At his deposition, Dr. Longnecker reconsidered his opinion a second time. Regarding his "To Whom It May Concern" letter Dr. Longnecker stated:

> Now, I did write a letter To Whom It May Concern, which is probably what this is all about today. That was after a conference with a nurse practitioner from Ingalls, Ms. Regina Ethridge, and she brought records to me from Dr. Dan Enger. Dr. Enger had released this patient without any permanency, and found nothing, basically, abnormal. Pretty consistent with our findings. And specifically she had asked me had I been aware that Dr. Enger had released him with no permanency after following him for that period of time, would I have probably not given him a permanency, and I said yes, I probably would not have.
>
> I didn't alter the fact of my opinion. I did, in fact, give him the permanency in trying to clear the water, or clear the air to resolve this issue. I think there is no question about it, this gentleman has a lot of subjective complainants, which it is difficult to correlate with any real objective findings, but this has gone on for 10, 12 years. He does have some manifest evidence of degenerative disc disease in his back. And in order to be fair and equitable, I did give him two percent total body loss, and I will stand by that at this point.

(CX 17, p. 11-12).

In making the causal connection between Claimant's current condition and his workplace injury, Dr. Longnecker stated that the causation was difficult for him to see. (CX 17, p. 31-32). From a historical point of view, Claimant suffered an accident in the shipyard and his problems followed that accident. *Id*. at 32. Thus, without any reason to believe otherwise, and being unaware of any interceding injuries, Dr. Longnecker made the causal connection to Claimant's workplace accident. *Id*. Dr. Longnecker was under the impression that Claimant had not been able to work at all since he was terminated by Employer, and he did not know that Claimant had numerous jobs from

the date of Claimant's termination in 1992 to the date of his examination in 1995. (CX 17, p. 16-17; Tr. 51-53).

On cross-examination, Dr. Longnecker related that Dr. Enger was in the best position to make a determination and diagnosis of Claimant's physical condition. (EX 17, p. 25). Although testing did not reveal much in the way of organic problems, that did not mean that Claimant was without mechanical problems. *Id*. at 26. Claimant had a degenerative disc and to say that nothing was wrong was "not fair." *Id*. Dr. Longnecker was willing to compromise the situation because there was nothing more he could do for Claimant, he was tired of hearing about Claimant's complaints and repeating very expensive diagnostic tests. *Id*. at 27. Apart from Claimant's disc bulge and degenerative condition, Dr. Longnecker stated that without Claimant's subjective complaints, he could never prove there was anything absolutely wrong with Claimant. *Id*. at 28.

In *Director, OWCP v. Bethlemem Steel Corp. [Robertson]*, 620 F.2d 60, 62-65 (5th Cir. 1980), the Fifth Circuit affirmed a decision by the Board in overturning an ALJ's determination of causation/extent when the ALJ had discredited the claimant as a witness and the only physician of record establishing a possible causal connection between the claimant's back pain and her workplace accident did so based on the claimant's subjective complaints. The physician had no objective diagnostic data in reaching his conclusion, and the evidentiary value of his conclusion was questionable in light of the claimant's lack of credibility. *Id*. at 64-65. Also, the physician's testimony failed to state with any degree of reasonable certainty an opinion regarding the fact of injury. *Id*. at 65. Furthermore, the physician did not examine the claimant until eighteen months after the workplace injury. *Id*. 61-62.

This case has many similarities with *Robertson*. First, I have already determined that Claimant lacks credibility. Second, Dr. Longnecker did not treat Claimant until five years after his injury and did not establish a causal connection until eight years after the event. Third, apart from some minor diagnostic findings of a bulging disc and some degenerative changes, Claimant's diagnostic results were "unrewarding." (CX 17, p. 28). Fourth, Dr. Longnecker's was unable to state with certainty that Claimant's condition was causally related to his workplace accident. Rather, Dr. Longnecker stated that causation was based on a historic perspective when he was not given the benefit of Claimant's work and social history - factors Dr. Longnecker considered significant in arriving at an opinion. (CX 17, p. 18). Finally, Dr. Longnecker stated that Dr. Enger was in an better position to make a diagnosis because he had examined Claimant within a few weeks of the workplace accident. (CX 17, p. 25). Dr. Longnecker made his motives clear in establishing causation and a two percent impairment rating in his deposition when he stated:

> Yes we have testing that doesn't show much, but that is not to say he doesn't have a mechanical problem, and he has some problems. To say that there is absolutely nothing wrong with this gentleman is probably not fair, and nor am I able with X-ray eyes to say that this man is totally malingering. I can't say that. What I am saying is, yes, this man has, there is no question, a lot of psychological problems with this gentleman, but I can't say that his back doesn't hurt. And therefore, that is why I was

> willing to compromise this situation. There certainly was nothing more I could do for him, and I couldn't repeatedly see him over months and weeks. I think we all got tired of hearing him and repeating these very expensive tests, and telling him, look there is nothing we can do, you are going to have to live with it.

(CX 17, p. 26-27).

Accordingly, I assign less weight to the medical reports of Dr. Longnecker establishing a causal connection. Because Dr. Longnecker is the only physician establishing that causal connection, and based on the record as a whole, I find that Claimant failed to establish that his current condition was caused by his June 26, 1990, workplace accident by a preponderance of the evidence. Claimant is not a credible witness. Dr. Longnecker was unaware of Claimant's social and work history, Dr. Longnecker and based his opinion on Claimant's subjective complaints. Dr. Longnecker examined Claimant long after the accident and deferred to the opinion of Dr. Enger. Finally, Dr. Longnecker stated that his final impression was a "compromise" between Claimant's subjective complaints and Claimant's unremarkable diagnostic findings. Accordingly, Claimant's petition for entitlement under the Act is DENIED.

In the event the Board should overturn my determination, I shall decide the issue of the nature and extent of Claimant's injuries.

D. Nature and Extent of Injury and Date of Maximum Medical Improvement.

Claimant seeks total and permanent disability and associated medical benefits as a result of his June 26, 1990 workplace accident. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service*

Engineering Co., 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). Here, I find that Claimant reached maximum medical improvement on September 13, 1990, the date Dr. Enger released Claimant for a trial of regular work duties and this recommendation followed his report of August 14, 1990 which stated that there was no contraindication to allowing Claimant to return to work as a chipper. (CX 1, p. 20, 22). Dr. Enger assigned work restriction s after that date, but those restrictions were based on Claimant' subjective reports of pain and there is no indication in the record that Dr. Enger's impression on September 13, 1990 was different than his impression on January 22, 1992, when he released Claimant to return to work without restrictions. (CX 1, p. 1). No physician after Dr. Enger has undertaken treatment of Claimant's physical condition with a view towards improvement. (CX 4, p. 6; CX 17, p. 27).

D(1) Nature of Claimant's Injury

The nature of Claimant's 1990 workplace injury is merely a back strain as diagnosed by Dr. Enger on June 29, 1990. (CX 1, p. 34-35). Diagnostically, the only abnormality Claimant has is degenerative changes at L4-5 with loss of water content and slight bulging but no disc herniation. (CX 1, p. 20; CX2, p. 5; CX 6, p. 4, 13). From a physical standpoint, Dr. Longnecker noted on May 20, 1998, that Claimant had mildly positive straight leg raises on the left, pain in the lower back on bending and subjective reports of continuing and progressive pain. (CX 6, p. 14). On March 6, 2001, however, Dr. Millette noted that Claimant's physical exam was unremarkable. (CX 5, p. 5). In his July 17, 1999, neurological exam, Dr. Jackson noted a limited range of motion of eighty degrees in the lumbar spine (due mostly to voluntary guarding), decreased sensation in the left hand at the C8-T1 distribution, and a loss of sensation in the left foot possibly due to the L4 distribution. (CX 4, p. 8). According to Dr. Jackson, Claimant simply had no significant pathology and the only positive signs Claimant exhibited were: pain and tenderness on palpitation, voluntary restriction of range of motion, and subjective sensory losses. *Id*. at 7. Subjectively, Claimant reported debilitating and progressive pain. (Tr. 54-55). Thus, the nature of Claimant's injury is that he suffers from degenerative changes at L4-5 and subjective pain, which at time affects Claimant's physical exam results, and which Claimant believes is progressive and debilitating.

D(2) Extent of Claimant's Disability

Following his June 29, 1990, examination of Claimant, Dr. Enger opined that Claimant was fit for light work, and if fitted with a back corset, Claimant could "remain on the job." (CX 1, p. 35). On July 13, 1990, Dr. Enger limited Claimant's lifting to thirty-five pounds. *Id*. at 26. In a report dated August 14, 1990, Dr. Enger found no reason why Claimant could not return to work as a chipper, but Dr. Enger limited Claimant to working "downhand" for four to six weeks with no overhead grinding. *Id*. at 22. By September 26, 1990, Dr. Enger noted that Claimant continued to complain of pain even working within his restrictions, but because Claimant's work up was negative, Dr. Enger stated that Claimant could remain on the job. *Id*. at 18. On October 24, 1990, Claimant stated that Employer offered him "downhand" work, eliminated overhead duties, eliminated grinding duties on an inclined plane, but Claimant stated that he still could not perform his assigned tasks

secondary to pain. *Id*. at 14. Based off a pain pattern picture prepared by Claimant, Dr. Enger could not think of any medical syndrome other than the fact that there was a strong possibility that Claimant was a symptom magnifier. *Id*. On November 16, 1990, Dr. Enger reported that there was no change in Claimant's condition, but nevertheless, he continued Claimant's restrictions for another three weeks. *Id*. at 12. On June 5, 1991, Dr. Enger stated that he could not assign any permanent disability rating as there was no objective findings present. *Id*. at 7. On January 22, 1992, Dr. Enger found nothing to objectively verify Claimant's subjective symptoms, apart from limited motion in arm raises, and Dr. Enger returned Claimant to work without restrictions. *Id*. at 1-2. Meanwhile, Claimant underwent treatment with Dr. Wiggins for his left ankle and knee in December 1991, due to an unrelated accident, and Dr. Wiggins released Claimant to return to work on March 4, 1992. (CX 1, p. 10).

On June 16, 1998, Dr. Longnecker stated that Claimant sustained a two percent total body loss and assigned work restrictions of no heavy lifting, bending or stooping. (CX 6, p. 11). Claimant could occasionally lift up to twenty pounds and should avoid stair climbing and ladders. *Id*. On May 27, 1999, however, Dr. Longnecker stated that after reviewing the records of Dr. Enger, he agreed that Claimant had no permanent impairment and did not have any work restrictions. (EX 9, p. 17). On June 4, 2002, Dr. Longnecker retracted his earlier statement and stood by his original conclusion that Claimant had a two percent disability rating. (CX 17, p. 11-12).

On June 17, 1999, Dr. Jackson conducted a neurological evaluation and opined that Claimant could return to a "medium to medium light" level of work, but limited Claimant's ability to do things above ninety "degrees elevation in the shoulder with prolonged fixed adverse posturing of the neck." (CX 4, p. 9). Dr. Jackson also stated that Claimant should avoid "working in a bent over or stooped over fashion respecting all limitations which have previously been issued by Dr. Longnecker and his other physicians." *Id*.

Accordingly from June 29, 1990 to July 13, 1990, Claimant was limited to "light" duty. From July 13, 1990 to August 14, 1990, Claimant's lifting was limited to thirty-five pounds. From August 14, 1990 to early December 1990, Dr. Enger continued Claimant's light duty restrictions based on his subjective complaints limiting Claimant to working "downhand" with no overhead grinding and no grinding on an inclined plane. Following unrelated restriction set by Dr. Wiggins, Dr. Enger release Claimant without restriction and without a permanency rating on January 22, 1992. While Dr. Longnecker initially assigned restrictions, he recanted after reviewing Claimant's earlier medical records, and then retracted his change of opinion and reaffirmed his conclusion that Claimant had a two percent disability rating. Dr. Jackson, who examined Clamant on one occasion opined that Claimant could return to a "medium to medium light" level of work, but limited Claimant's ability to do things above ninety "degrees elevation in the shoulder with prolonged fixed adverse posturing of the neck." (CX 4, p. 9). Dr. Jackson also stated that Claimant should avoid "working in a bent over or stooped over fashion." *Id*.

I accord more weight to the opinions of Drs. Enger and Longnecker over that of Dr. Jackson. Both Drs. Enger and Longnecker treated Claimant over a long period of time, having the opportunity

to evaluate Claimant's subjective pain behavior and reactions to examination. Dr. Jackson merely saw Claimant on one occasion and opined that there was nothing form a neurological standpoint that he could do to help Claimant. Furthermore, Claimant presented to Dr. Jackson with neck pains which Dr. Jackson attributed to a 1998 motor vehicle accident and any impairment Dr. Jackson assigned to Claimant based on that injury has no bearing on the extent of Claimant's injury in 1990.

I accord more weight to the opinion of Dr. Enger over Dr. Longnecker because Dr. Longnecker stated that Dr. Enger was in a better position to make a determination of the extent of Claimant's disability having treated him soon after the injury. (CX 17, p. 24-25). Furthermore, Dr. Longnecker first examined Claimant five years after the accident and after Claimant had engaged in other physical labor for other employers - a fact Claimant did not disclose to Dr. Longnecker. (CX 17, p. 16-17; Tr. 51-53). As noted *supra*, I do not find that Claimant made a credible witness, and I give his subjective reports of pain little weight. Thus, Claimant's subjective reports of pain alone cannot establish the extent of his disability. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991) (finding that a claimant's credible subjective complaints of pain are sufficient to establish the extent of the claimant's injuries). Dr. Longnecker clearly related that his 1998 impairment rating was based in a large part off the subjective complaints of Claimant, and he could not prove there was ever anything wrong with Claimant. (CX 17, p. 26-28). Rather, Dr. Longnecker's impairment rating was a "compromise" and an effort to end the matter. *Id*. Accordingly, I find that Claimant does not have a permanent disability or any restrictions that would prevent him from working as a result of his 1990 workplace accident after September 13, 1990.[4]

E. Conclusion

I find that Claimant made an incredible witness. Claimant failed to carry his burden of persuasion based on the record as a whole that his physical condition after he received treatment with Dr. Enger was causally related to his June 26, 1990 workplace accident. Following his workplace accident, Employer paid Claimant for several periods of temporary total disability and found work within the restriction set by Dr. Enger. Claimant was released by Dr. Enger in January 1992 without restrictions. I find that Claimant reached maximum medical improvement on September 13, 1990, because I find no distinction in Dr. Enger's diagnostic impression between this date and the day Dr. Enger released Claimant without restriction. I give more weight to the opinion of Dr. Enger over Dr. Longnecker in establishing the extent of Claimant's injury because Dr. Longnecker deferred to the impression of Dr. Enger, he made his impairment rating eight years after the workplace accident, based on an incomplete social and work history, and made the rating as a compromise between Claimant's subjective pain complaints and the unremarkable diagnostic findings.

VI. ORDER

[4] It is possible that the 1990 accident aggravated an underlying fibromyalgia syndrome, but in the absence of a medical opinion explaining how that syndrome would prohibit Claimant from working or performing certain tasks, I cannot ascertain the extent of Claimant's disability.

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

Claimant's petition for benefits under the Act is DENIED because Claimant failed to establish that his condition after January 1992 was causally connected to his June 26, 1990 workplace accident. In the alternative, Claimant's petition for benefits under the Act is denied because Claimant failed to establish that he suffered any lingering disability as a result of his 1990 accident after September 13, 1990, and failed to show that further medical treatment was warranted.

A

CLEMENT J. KENNINGTON
Administrative Law Judge